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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-116

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

versus

BILLY B. WIMBERLY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now BILLY B. WIMBERLY, Respondent, and makes and files this response in opposition to the petition

for a writ of certiorari herein, praying that the petition be in all things denied.

JURISDICTION

The potential jurisdiction of the Court is admitted.

The Respondent strenuously asserts that certiorari should be denied, however, since there is no special or important reason for granting the same in this case.

This is a routine Jones Act personal injury case, and the decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor is there any other consideration, under Rule 19, Rules of the Supreme Court of the United States, which would justify granting the petition in the sound judicial discretion of the Court. Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. *Rice v. Sioux City Memorial Parks Cemetery*, 75 S. Ct. 614, 349 U.S. 70, 90 L.Ed 879 (Iowa 1955). Clearly this case involves no such considerations.

QUESTIONS PRESENTED

Being mindful of Rule 24 and 41, Rules of the Supreme Court of the United States, the Respondent vigorously disagrees that this case involves the questions stated on Pages 2 and 3 of the Petition, or that those questions are presented in any way by the appeal of this case. Instead, the Respondent asserts that the following questions

are presented by this appeal and that those questions are to be answered, and have been answered, in the affirmative, by the overwhelming weight of clear and cogent authority:

1. Isn't it true that a defect in a ship's own integral electrical system can render it unseaworthy?

2. Isn't it true that insufficient manpower or assistance for a particular job may render a vessel unseaworthy?

3. Isn't it true that medical records may be admitted into evidence on the trial of a personal injury case, under the applicable state and federal statutes and authorities?

STATEMENT OF THE CASE

This is a routine, straightforward, uncomplicated Jones Act case in which the plaintiff was suing for personal injuries sustained in the course and scope of his employment aboard defendant's vessel. There is absolutely nothing novel about the case; it is exactly like literally thousands upon thousands of other cases which have been settled by the weight of ancient authority and a jury's verdict.

Wimberly was employed by Union Oil as a seaman and member of the crew of the SS PURE OIL, an ocean-going tanker.

On March 10, 1973, Wimberly and some other seamen were back in the crew mess; the television set would not work properly; and the radio operator came back to attempt to fix the set. The radio operator could not get the set working in the crew mess, so he asked Wimberly to take the set up forward to the midshiphouse where he, the

radio operator, would work on it. After the radio operator had worked on the T.V. set in the midshiphouse, Wimberly was called upon to carry it back to the crew mess in the afterhouse. The ship was at sea, it had been misting rain, the wind had been blowing, and the catwalk was wet. As Wimberly was carrying the console model T.V. set by himself, his feet slipped out from under him just as he was about to go into the afterhouse.

The radio operator was walking right behind Wimberly as he carried the heavy T.V. set along the catwalk, from the midshiphouse back to the afterhouse. Although it was a two-man job, the radio operator neither assisted Wimberly, nor did he offer to get him anybody else to help him with the T.V. set.

The plaintiff went to trial on the theory that the ship was unseaworthy and the defendant negligent, because the radio officer did not call out anyone to help Wimberly with the T.V. set, and did not himself assist Wimberly.

Significantly, it had developed that the reason the television set would not play was not the result of any fault in the set; instead, an inverter in the ship's own electrical system went out, and it was this fault within the ship's own system that was causing the problem. In other words, the defect was in the ship itself, because the set worked perfectly.

The Court charged the jury that the plaintiff could recover either on unseaworthiness, or on negligence. The jury returned a verdict in favor of Wimberly, and a judgment thereupon was entered.

ARGUMENT

I.

The clear and uncontroverted evidence upon the trial of this case showed that:

1. **The plaintiff got hurt because of a failure of the ship's own electrical system; and**
2. **The plaintiff got hurt because he was not given assistance to perform a two-man job.**

In the face of this *uncontroverted* evidence, the petitioner claims an insufficiency of evidence to support a recovery on the theory of unseaworthiness. Literally, the petitioner's position is ludicrous, and the petition is frivolous.

There is no question that the breaking and failing of an integral part of the ship's electrical system renders the vessel unseaworthy. Thus, in *Hudson Waterways Corporation v. Schneider,* 365 F.2d 1012 (C.A. 9, 1966), the seaman was injured when he was shocked by defective wiring in the ship's electrical system. The Court held that, even though Schneider was engaged in repairing the defect at the time of his injury, the defect rendered the vessel unseaworthy and Schneider was therefore entitled to recover for that injury. *Schneider* stands for the proposition that a seaman is entitled to recover unseaworthiness indemnity for injuries caused by a failure of a component in the ship's electrical system. Here, Wimberly was injured as a result of a failure of a component in the ship's electrical system. It is difficult to conceive of any argument denying the application of *Schneider* to the instant situation.

Another case supporting the judgment is *Texas Menhaden Company v. Johnson,* 332 F.2d 527 (C.A. 5,

1964). There, the trial court judgment was for the plaintiff, and in affirming that judgment, the Court said, at Page 528:

> "And it is settled law that failure of a piece of equipment under proper and expected use is a sufficient predicate for a finding of unseaworthiness."

Here, the piece of equipment was the ship's own integral electrical system. It failed under proper and expected use, and that failure directly and proximately resulted in the plaintiff's injury. Indeed, the plaintiff should have had an instructed verdict in his favor on the issue of unseaworthiness.

II.

In addition to the fact that Wimberly's injury was caused by a defect in the ship itself, the evidence was also uncontroverted that Wimberly was doing a two-man job by himself. The law is abundantly clear that insufficient manpower for a particular job renders a vessel unseaworthy. Thus, in *American President Lines v. Welch,* 377 F.2d 501, cert. denied 389 U.S. 940 (C.A. 9, 1967), a seaman was injured while carrying a large heavy piece of a pump. It was determined in the District Court that the job, done by the seaman alone, was really a two-man job. The Court, in affirming a finding that the vessel was *unseaworthy,* said at Page 504:

> "In the present case repairing the lube pump was a two-man job and it was dangerous for one man to proceed alone. We hold that the SS PRESIDENT ROOSEVELT was improperly manned when Appellee repaired the lube pump without being supplied with adequate help."

The inadequacy of the help, said the Court, was not only evidence of the defendant's negligence; additionally, it constituted actionable *unseaworthiness.*

The Fifth Circuit, in a decision in which its Chief Judge participated, reached exactly the same conclusion. In *Moschi v. SS Edgar F. Luckenbach,* 424 F.2d 1060 (C.A. 5, 1970), the plaintiff was assigned to lift and remove a motor in the engine room of the vessel. The Trial Court found that the job plaintiff was assigned to do alone was a two-man job, and in view of the inadequacy of assistance, held the vessel *unseaworthy*. The Court, speaking PER CURIAM, affirmed the District Court's finding of unseaworthiness. The Court discussed the finding of contributory negligence, and then went on to say, at Page 1061:

> "But that does not discharge the vessel from the responsibility of supplying adequate personnel available in the first instance for performance of a task."

In short, inadequacy of personnel for a particular task can render a vessel unseaworthy; in this case, the testimony of the inadequacy of personnel more than supported the jury's finding.

III.

The petitioner also makes complaint of the entry of certain hospital records. Petitioner does not identify the particular portions of the records, nor the diagnoses or entries complained of. It is impossible to meet the Petitioner's objection, or to pass upon them, in any intelligible way.

Rule 43, Federal Rules of Civil Procedure, provides in pertinent part as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case, the statute or rule which favors the reception of the evidence governs.* . . ." [Emphasis supplied]

In other words, the most liberal rule of evidence, either that of Texas state practice or that provided by federal statute, governs.

The applicable federal statute is indeed 28 U.S.C.A. Section 1732, generally called the Federal Business Records Act. Generally speaking, that statute has been construed to permit the reception into evidence of hospital records, even when those hospital records contain certain opinions by the attending physicians. Thus, as it was said in 9 A.L.R. Fed. 457, at Page 482:

> "The courts have generally had no difficulty in respect of the Federal Business Records Act's application to entries relating to palpable physical conditions, even when they reflect diagnostic observations that are arguably in the nature of opinion, holding that hospital records showing the nature and extent of a patient's injury or disease *are admissible* in evidence under 28 USC Section 1732(a)." [Emphasis supplied]

The treatise then goes on to discuss the pertinent authorities, concluding that routine diagnoses are indeed admissible.

In summary, the Petitioner has nowhere pointed out the particular entries to which it objects, and it is impossible

to pass upon this point. All the records were routine, straightforward, and clear, however, and there was not even the slightest suggestion that any material was speculative or conjectural, or that any physician disagreed with any of the entries. Significantly, Union Oil did not call any medical witness of its own or offer any medical records itself, nor did it ever take the position that the records were incorrect. Clearly the records were entirely admissible under the applicable statutes and cases.

CONCLUSION

The evidence on the trial of the case showed that the plaintiff got hurt because the ship's own electrical system was defective, and failed, and also because the plaintiff was not given sufficient manpower or assistance for the job at hand. Manifestly, upon this evidence the jury was justified in finding that the vessel was unseaworthy, and that that unseaworthiness proximately caused the plaintiff's injuries. The hospital records are clearly admissible under the statutes and cases, and should have been received in evidence for all purposes.

There is no special or important reason for the granting of the Petition, and in the sound judicial discretion of the Court the Petition should be in all things denied.

Respectfully submitted,

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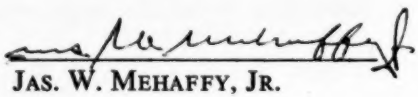
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to Petition for a Writ of Certiorari has been served upon counsel for the Respondent by mailing same to him on August 15, 1975, in a securely sealed, postage prepaid envelope addressed to Mr. Robert M. Julian, 1314 Texas Avenue, Suite 512, Houston, Texas 77002.



JAS. W. MEHAFFY, JR.